87-995

Supreme Court, U.S.
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No. 87-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

LARRY WINFRED SHILLING,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

1. **WHETHER THE WARRANT AUTHORIZING THE SEARCH CONSTITUTED A GENERAL WARRANT AND, ALTERNATIVELY, THE EXECUTION OF THE WARRANT AMOUNTED TO A GENERAL SEARCH IN VIOLATION OF THE FOURTH AMENDMENT.**

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OPINION BELOW

The United States Court of Appeals for the Fourth Circuit 1987 decision affirming the conviction of Petitioner is reported at 826 F.2d 1365 (4th Cir. 1987). (App. A) 1/

JURISDICTION

The judgment of the court of appeals was entered August 26, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment provides, in pertinent part, that:

> "[N]o warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the places to be searched, and the persons or things to be seized."

Title 21, U.S.C. Sec. 881 - Forfeitures. (App. B).

1/"App." refers to the Appendix that follows this Petition. "J.A." cites refer to the Joint Appendix prepared by counsel below in accordance with Rule 10, Red. R. App. Pro. and the Fourth Circuit Rules.

STATEMENT

On May 14, 1984, a team of federal agents from the Drug Enforcement Administration (DEA), Bureau of Alcohol, Tobacco and Firearms (BATF) and the Internal Revenue Service (IRS) executed a search warrant on the property of the Petitioner Larry W. Shilling located at 732 Gates Lane, N.E., Roanoke, Virginia.

Prior to obtaining the search warrant, DEA Special Agent Stanley Burroughs, the agent in charge of the execution of the warrant (J.A. 1441), met with Assistant United States Attorney (AUSA) Richard Pearce to discuss the property the government intended to seize pursuant to its investigation. (J.A. 1437-1438). Approximately one week before the execution of the search warrant, Burroughs and Pearce met with U.S. Marshal Beman and his chief deputy

to discuss with them the large amount of personalty, including an automobile and several motorcycles, which they intended to seize pursuant to the warrant. (J.A. 1294, 1295).

The affidavit sought authority to seize assets pursuant to 21 U.S.C. Sec. 881, specifically including a jacuzzi and a television satellite system. While the agents intended to seize other items, no other tangible assets were listed in the affidavit. Although federal law enforcement agents and the Assistant U.S. Attorney knew before their application for the warrant that they intended to practically empty Petitioner's house, their intentions were purposely concealed from the magistrate in both the draft warrant and the accompanying affidavit. Thus, the magistrate was uninformed as to the officers' intentions when he was

asked to authorize this search. The Fourth Amendment command that a judicial officer be interposed between the private citizen and law enforcement officers who are engaged in the competitive business of ferreting out crime was rendered a nullity by the act of keeping the magistrate ignorant of the officers' intentions. Since the magistrate had no idea that they intended a search as broad as that which transpired and the limitations which he did impose were completely ignored, it was impossible for the magistrate to limit the scope of the search.

Careful scrutiny of the warrant and affidavit indicate that authority was sought to seize any and all assets found at the Petitioner's residence, without regard to when or how those assets were obtained, even though the affidavit

itself states that the alleged criminal conduct began sometime in 1982. Nowhere in the affidavit is the magistrate informed of any standard to be used to determine what, if any, assets are proceeds of the alleged illegal activity, 2/ or how any of the items to be seized related to the investigation. The affidavit further requests authority to search for unidentified assets and states that the search is necessary to identify and seize them. A search for unidentified assets cannot be particular and, therefore, cannot meet any test of particularity as mandated by the Fourth Amendment. The warrant itself specifically incorporates the affidavit by reference, thereby creating a

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2/ For an example of the warrant giving unbridled authority to the officers in violation of the Fourth Amendment, see footnote 9, page 17, infra.

situation where there was no limitation on the authority granted by the magistrate to the agents. The magistrate thus became a mere rubber stamp for the intentions of the agents.

On the date of the raid, a "briefing" of the raid team was held at the police academy. (J.A. 1443-1445, 1474). Agent Burroughs read out loud to the members of the team the portion of the warrant titled "Items to be Seized." When the raid team arrived at Petitioner's property to "execute" the warrant, their access to the property was blocked by a pick-up truck and a gate. Bobby Cook, who was repairing the gate, was arrested immediately without probable cause and the raid team seized his father's pick-up truck to utilize in the agents'

"execution" of the warrant.3/ Upon the raid team's arrival at the main house, the Petitioner was immediately arrested. (J.A. 1459).

Once on the property, the "execution" of the warrant began. Agents Burroughs' and Higginbothem's testimony is illustrative of both how the agents viewed the authority granted by the warrant and how the search was executed.

Agent Burroughs:

> I had no way of knowing and neither did anyone else what items would be found on that

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3/ The commandeering of the truck was in violation of Virginia Code Sec. 18.2-102. With respect to the reason the truck was appropriated, one agent testified that the truck was in the raid team's way and could not be moved. Another agent testified that the truck was facing the wrong direction, but was easily turned around so that it could be used to transport the raid team. Yet, another posited a "trojan horse" explanation for its seizure and use. (J.A. 1175).

> property that we had probable cause to believe would be subject to seizure under 881 or any other statutory authority we had. (J.A. 1440).

Agent Higginbothem:

> Well, it wasn't really a search. It wasn't really a search. We reviewed the documents in the file cabinet and realized there were so many documents that we could not go through them. So we decided to keep them in one place, and that is when we decided to keep the whole cabinet. (J.A. 1243).

Higginbothem's testimony is particularly curious inasmuch as the Petitioner's home where the records were found was seized pursuant to civil process executed at the same time that the search was commenced.

Every conceivable category of personalty was fair game for seizure: furniture, weapons, political memorabilia, books, motorcycles, automobiles, jewelry, stereo equipment,

and even a board game. Photograhs taken during the execution of the search depict the frivolous and cavalier attitude among the agents who executed the warrant. One photo shows an agent hiding coyly under a bearskin rug belonging to the Petitioner. Another shows agents posing with political memorabilia which was seized, but which failed to appear in the return inventory. Apparently, the political items were taken and kept by the executing officers as souvenirs. Agents also seized almost every document in the residence, dumping the contents of drawers into plastic bags and even removing entire file cabinets of paper without regard to whether the items contained therein were described in the warrant. 4/ (J.A. 1343). Although

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4/ Many of the documents seized were of a personal nature that could not possibly have been within the scope of the warrant, including the Petition's divorce records, his high school diploma and several photographs of his young daughter. (J.A. 1254, 1244).

agents were on the premises for three days (J.A. 1327) and the house was thereafter held by the government for forfeiture under 21 U.S.C. Sec. 881, the IRS claimed that their wholesale looting was justified by a desire to keep the large volume of documents together and prevent loss. (J.A. 1251-1252).

On May 15, 1984, Agent Burroughs, AUSA Pearce and U.S. Marshal Beman met, on the premises of the Petitioner's home, to divy up the items which were to remainin the house, and those which were to be seized, and to decide what agency was to seize which items. (J.A. 1304-1306). 5/ Thus, the probable cause

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5/ The search commenced on May 14, 1984, yet the meeting to decide how to divy up the property and decide under what authority certain items were seized did not occur until May 15, 1984.

determinations were made subsequent to the seizure. The warrant, which was procured without any indication to the magistrate of the scope of the search intended, served as a pretext to enter the Petitioner's home and engage in a general rummaging of the contents.

The Petitioner was later indicted and evidence obtained as a direct result of the search in question was the basis of his conviction. 6/

6/ The indictment charged Petitioner with possession with intent to distribute methamphetamine and marijuana in violation of 21 U.S.C. Sec. 841(a)(1), which was later dropped; possession of unregistered firearms in violation of 26 U.S.C. Sec. 5861(d) and Section 5871; and possession of untaxed liquor in violation of 26 U.S.C. Sec. 5604(a)(1). A four count indictment was subsequently returned charging the Petitioner with the making of false income tax returns in violation of 26 U.S.C. Sec. 7201 and perjury in violation of 26 U.S.C. Sec. 7206(1).

A motion to suppress was filed. After an evidentiary hearing, the district court concluded that, while the search and seizure were "far-reaching" and "[t]here was no attempt by the IRS agents to distinguish what was seizable and what was not before removing the items from the premises," their actions were "not unreasonable under the circumstances." (J.A. 1524-1526). The court of appeals affirmed the district court.

I. REASONS FOR GRANTING THE WRIT

The issue presented in this case concerns both the issuance of a warrant that is facially general and, alternatively, the execution of the aforesaid warrant in a manner which constituted a general rummaging through the property of the Petitioner in violation of the Fourth Amendment.

A. GENERAL WARRANT

Lacking probable cause to seize numerous items located on the premises of the Petitioner, agents of the DEA, BATF, IRS, and an Assistant United States Attorney acted in concert to usurp the authority of a judicial officer with respect to the issuance of a search warrant by intentionally failing to particularize the application for the search warrant in violation of the Fourth Amendment. As a result of their actions, the magistrate issued a warrant providing for the search of the Petitioner's home that left virtually every piece of property on the premises subject to seizure without regard to whether there was probable cause for such searches and/or seizures.

The Fourth Amendment requires that "no warrant shall issue . . . without

particularly describing the place to be searched, and the person or thing to be seized." The mandate of particularity is aimed primarily at protecting the privacy interests of the citizen against a general exploratory rummaging through the individual's possessions. See Coolidge v. New Hampshire, 403 U.S. 443, 467, 91 S.Ct. 2022, 2038 (1971); Go Bart Importing Co. v. United States, 282 U.S. 344 (1931); Berger v. New York, 388 U.S. 41 (1967); Andresen v. Maryland, 427 U.S. 463 (1976).

Here, the warrant authorized the search for and seizure of all automatic weapons. (J.A. 1504). The affidavit, however, only mentioned three items, none of which were automatic weapons (J.A. 1808) and the information regarding these items was at least two years old and established no nexus between the property

the government sought to seize and the premise the government sought to search. See United States v. Gomez, 652 F. Supp. 461, 463 (E.D. N.Y. 1987) (Held the warrant was defective for failing to establish a "sufficient nexus to the particular location to be searched.") Further, the warrant placed no time limitation on the extent of the warrant's reach. Although the alleged criminal conduct began two years earlier, Items 35 through 38 of the affidavit sought discovery of unnamed and unspecified items. (J.A. 1810-1812). The warrant itself included a provision which left entirely to the discretion of the officials involved in the execution that

which to seize. 7/

A "description is sufficiently particular when it enables the searchers to reasonably ascertain and identify the things authorized to be seized." United States v. Waugneux, 683 F.2d 1343, 1348 (11th Cir. 1982). See also, In Re Application of Lafayette Academy, Inc., 610 F.2d 1, 3, 5 (1st Cir. 1979), United States v. Abrams, 615 F.2d 541 (1st Cir. 1980), United States v. Roche, 614 F.2d 6 (1st Cir. 1980).

Perhaps the most disturbing aspect of this case is the unquestionable

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7/ Paragraph 5 of the list of items to be seized provided in part: "United States Currency, previous metals, jewelry, and financial statements. . .to the extent that these items are found in such quantity, substance and/or qualilty as to permit a reasonable inference that such items were involved or give indications of commission of any of the criminal violations set forth herein and in the accompanying affidavit." (Emphasis added). (J.A. 1503).

intentional misleading of the magistrate by the agents and the Assistant U.S. Attorney, an officer of the court, regarding the scope of the search intended. Those involved in the pre-search meeting knew the nature of the property they intended to seize, yet the government purposely failed to indicate to the magistrate the extent of the seizure intended.

> A judicial officer cannot perform the function of issuing a warrant particularly describing the places to be searched and the things to be seized, and of supervising the proper return of such process, where the police fail to disclose an intent to conduct a search the purposes and dimensions of which are beyong that set forth in the affidavits.

United States v. Rettig, 589 F.2d 418, 423 (9th Cir. 1978). See also, Vonder Ahe v. Howland, 508 F.2d 364 (9th Cir. 1974).

The government intended to seize all manner of personalty--cars, non-automatic weapons, motorcycles, political memorabilia, furniture, etc. By failing to advise the magistrate of the purpose of the search and its intended scope, the agents deprived the magistrate of "the opportunity to exercise meaningful supervision over their conduct and to define the proper limits of the warrant." Rettig, supra, 422-423. Thus, the warrant here neither served to circumscribe the discretion of the executing officers nor did it inform the party subject to the search and seizure what the officers were entitled to take. As a result, two of the more important purposes of the prohibition against general warrants were thereby rendered non-existent. See In Re Application of Lafayette Academy, Inc., supra.

It is not the generic nature of the items to be seized that causes the Petitioner to question the efficacy of the warrant in this case. Rather, it is the wholesale failure of the government to specify that which it intended to seize where, as here, the government knows exactly what property it is determined to seize. The warrant here lacked particularity and amounted to an authorization for an exploratory search, permitting the officers to wander at will through the property of the Petitioner and to seize anything which was, in their determination, conceivably incriminatory. See Montilla Records of Puerto Rico v. Morales, 575 F.2d 324 (1st Cir. 1978) (First Circuit held that a warrant which authorized the seizure of all illegal recordings impermissably left to the discretion of executing

officers that which to seize.) Here, just as in Montilla Records and in the case of the infamous writs of assistance, the ultimate determination of what to seize was impermissably left to the discretion of the executing officers. Perhaps, even more disturbing is the fact that, by misleading the magistrate in this case, the agents intentionally eliminated the judicial officer from the process.

Total suppression is appropriate where, as here, the very process by which the searching authorities gained access to the property was as improper as the search itself. Any remedy short of total suppression would only justify the unconstitutional general warrant by what was found during its execution. See United States v. Burch, 432 F. Supp. 961 (D.Del. 1977); Marvin v. United States,

732 F.2d 669, 674-675 (8th Cir. 1985); United States v. Heldt, 668 F.2d 1238, 1259 (D.C. App. 1981); United States v. Tamura, 694 F.2d 591, 597 (9th Cir. 1982); and United States v. Waugneux, supra, 1354.

B. THE EXECUTION OF THE WARRANT WAS SUCH AS TO TAKE AN ARGUABLY VALID WARRANT AND CONVERT IT INTO A PROHIBITED GENERAL WARRANT

The Fourth Amendment is violated when law enforcement agents, who are in possession of a valid warrant, conduct a search which amounts to a general rummaging through the property of an individual as if the limitations imposed by the judicial officer were irrelevant. See United States v. Heldt, supra. Here, the affidavit sought authority to search and seize under 21 U.S.C. Sec. 881, a civil forfeiture statute. The warrant issued, however, did not include such authority. Nonetheless, that fact did

not stop the agents from conducting an unauthorized 881 search and seizure. More personalty was seized from the Petitioner's residence as a result of the unauthorized 881 search and seizure than was seized as a result of the arguably authorized search and seizure.

The manner in which federal agents executed the warrant clearly troubled both the district and circuit courts. 8/ The government itself stated that IRS agents' seizure of entire file cabinets from the Petitioner's house was overbroad, (App. A, 20) but relied on so-called "practical considerations" in an attempt to justify their wholesale

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8/ "We recognize the questionable propriety of the IRS agents' seizure of documents not covered by the warrant, as did the Court below in its Order denying Shilling's suppression motion." (App. A. 19-2).

seizure of documents. The district and circuit courts, in accepting this excuse, neither specified nor articulated what is meant by "practical considerations." Not only were agents on the property for three days, but the house was subsequently held in forfeiture by the government pursuant to 21 U.S.C. Sec. 881, allowing for a leisurely and ordered search for documents authorized for seizure in the warrant. Yet, after a cursory look, agents taped up the file cabinets without really knowing what was in them, and had them removed to another location for further examination.

In United States v. Tamura, supra, the Ninth Circuit held that, while it was a close case, practical considerations of convenience motivating the removal of entire file cabinets from a business were

not violative of the Fourth Amendment. Tamura can be distinguished from the instant case on several grounds. Firstly, the "practical considerations" of Tamura reflect that the search occurred during business hours, at an ongoing business, where delay and the excessive time necessary to execute the warrant would further disrupt a business which was not itself the object of the search. As noted, the present case is characterized by the agents' extended and uninterrupted occupation of the residence to be searched, and an absence of disruptive factors such as those incident to Tamura. The record reflects no latent dangers or time constraints limiting the agents' orderly perusal of the documents contained in the file cabinets. Rather, the IRS agents claimed a last-minute desire to keep the large volume of

documents together allegedly to preclude loss. It is obvious that the "practical considerations" which here served to outweigh Petitioner's Fourth Amendment protections were merely those of convenience. In affirming the district court's denial of Petitioner's motion to suppress, the court of appeals thereby established a de facto "convenience exception" to the exclusionary rule in the Fourth Circuit.

Secondly, Tamura recognizes that there are "comparitively rare instances where documents are so intermingled that they cannot feasibly be sorted on site" as the government claimed as the mitigating factor in the present case. "However," the court continues to say, "the wholesale seizure for later detailed examination of records not described in a warrant is significantly more intrusive,

and has been characterized as 'the kind of investigatory dragnet that the fourth amendment was designed to protect'." Id. at 595 (emphasis original), quoting from United States v. Abrams, 615 F.2d 541, 543 (1st Cir. 1980).

To guard against this impermissible intrusion, the Ninth Circuit established a mechanism by which law enforcement officers can respond to situations where documents are confusingly intermingled: either apply directly to the magistrate for special authorization prior to the search, 11/ or obtain approval for further search from the magistrate once the infeasibility of on-site sorting

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11/ "If the need for transporting the documents is known to the officers prior to the search, they may apply for a special authorization for large scale removal of material, which should be granted by the magistrate issuing the warrant only where on-site sorting is infeasible and no other practical alternative exists." Tamura, supra, 596. See United States v. Hillyard, 677 F.2d 1336, 1340 (9th Cir. 1982).

becomes apparent. 12/ Each of these alternatives serves to insert the judicial officer back into the process when circumstances call for impermissible inferences by law enforcement officers in the execution of a search warrant. The function of the magistrate as a neutral buffer between the police and the citizen is thus preserved.

In United States v. Waugneux, supra, the Eleventh Circuit approved of the following procedure:

> The agents were given an opportunity to read the warrant and affidavit, the search party then moved over to the premises of Sage Corporation, where agents were assigned to search specific areas. Searching began that afternnon and continued through the next day August 4. If an agent found a document he believed fell within the authorization of the warrant, he removed the document and placed it in a

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12/ "...the government and law enforcement officials can generally avoid violating Fourth Amendment rights by sealing and holding the documents pending approval by the magistrate of a further search." Tamura, supra 595-596.

> box. If the document was part of a file, or was a page in a book or a binder, the whole file or volume was removed. Agent O'Dea and Strike Force attorney Steinberg circulated throughout the premises during the search and reviewed the documents being removed. If either O'Dea or Steinberg thought a document did not meet the criteria of the warrant, the document was returned to the file.
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> * * *
>
> Most relevant for our purposes was the final measure of having the readers of the search review the documents identified by the agents before making a final determination on whether to seize them.

683 F.2d at 1351-1353.

The Fourth Circuit, in upholding the lower court's decision to allow the materials obtained by such methods into evidence, has distorted the Tamura decision beyond recognition or reason. As a result, law enforcement officers will be responsible for making

on-the-spot, often legally complex, judgments as to what circumstance might qualify as a "practical consideration" in any given search and seizure. There is no "bright line" available to show analytically or practically where to stop. In addition, officers will be given greater discretion while the degree of influence a judicial officer will be able to exert in the on-going process of evaluating the propriety of seizure of items has been significantly diminished. Such a diminution of the citizen's privacy and property rights cannot help but to weaken the Fourth Amendment protections in the name of "efficency." Mere police efficiency, however, has never been an adequate basis to justify departure from the Fourth Amendment's limitations on search and seizure. United States v. United States District

Court, 407 U.S. 297 (1972), at 315-16. The Fourth Circuit de facto "convenience exception" to the exclusionary rule provides a jarring dissonance among the harmony of the circuits, requiring review by this Court.

LARRY WINFRED SHILLING
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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Petition for Writ of Certiorari to the U.S. Supreme Court was mailed postage prepaid, this 19th day of November, 1987 to Thomas J. Bondurant, Jr., Esquire, Asst. U.S. Attorney, Poff Federal Building, 210 Franklin Road, Roanoke, Virginia 24011.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-5055

UNITED STATES OF AMERICA,

Appellee,

versus

LARRY WINFRED SHILLING,

Appellant.

No. 85-5056

UNITED STATES OF AMERICA,

Appellee,

versus

LARRY WINFRED SHILLING,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, AT ROANOKE, JACKSON L. KISER, DISTRICT JUDGE. (CR 84-29;34)

Argued: January 7, 1987-Decided: August 26, 1987

Before HALL, Circuit Judge, BUTZNER, Senior Circuit Judge, and SIMONS, Senior United States District Judge for the District of South Carolina, sitting by designation.

APPENDIX A

Thomas J. Bondurant, Jr., Assistant U.S. Attorney, for the United States; Larry Winfred Shilling, William B. Moffitt, Thomas Rawles Jones, Jr., Lisa Bondareff Kemler, (Moffitt & Jones on Brief), John A. Keats, William F. Krebs, (Keats, Krebs & Leckey on Brief), for Appellant.

PER CURIAM:

These two cases present appeals on a range of issues from criminal proceedings against the appellant in the Western District of Virginia. In No. 85-5055 the appellant, Larry Shilling, was indicted on 16 counts, alleging (1) possession with intent to distribute methamphetamine and marijuana in violation of 21 U.S.C. Sec. 841(a)(1); (2) possession of unregistered firearms in violation of 26 U.S.C. Secs. 5861(d) and 5871; and (3) possession of untaxed liquor in violation of 26 U.S.C. Sec. 5604(a)(1). Counts 1 and 2 of this Indictment were later dismissed without prejudice, dropping the charges of possession with intent to distribute. The appellant was later convicted of 13 of the remaining 14 counts, most of which concerned

possession of automatic weapons.

The second case, No. 85-5056, concerns a subsequent four count Indictment charging the making of false income tax returns, in violation of 26 U.S.C. Sec. 7201 and perjury in violation of 26 U.S.C. Sec. 7205(1). After Shilling's conviction on the first case, he pled guilty to Counts 1 and 3 of the second Indictment. These counts concerned the making of false tax returns. Counts 2 and 4, which charged perjury, were dismissed.

Shilling was sentenced to a total of 15 years in custody and Fifteen Thousand Dollars ($15,000.00) in fines on the firearms case, and to eight years custody with a Ten Thousand Dollars ($10,000.00) fine on the tax return case, said custodial sentence running concurrently

with the firearms sentence.

There are three primary foci of appellant's arguments. First, he contends that certain of the weapons in the firearms case were not automatic firearms within the meaning of the statute. Alternatively, he contends that it was necessary for the government to prove that he knew that the guns in question had been converted to automatic firing. Second, he contends that he was denied effective assistance of counsel because his first attorney, David Nichols, who was himself a target of the grand jury investigating Shilling for tax violations, testified before the grand jury without advising Shilling that he was going to do so. Third, Shilling contends that the search warrant on which the search of his residence was based was

so broad as to constitute a general warrant, or alternatively, that the execution of the search was so uncontrolled as to amount to a general search, in violation of his Fourth Amendment rights.

We address the three areas of Shilling's appeal seriatim:

(1) Shilling's Claim That Weapons Were Not Automatic Firearms Or, Alternatively, That the Prosecution Should Have been Required to Prove That Shilling Knew the Weapons in Question Were Automatic.

Fifty guns were seized from Shilling's house and garage, of which 13 were the basis for Firearms Act violations under 26 U.S.C. Sec. 5801 et seq., because Shilling had not registered these firearms. Ten of the firearms were

machine guns; one was a pen gun; one was a silencer; and one was a short-barrel rifle. All of the machine guns were originally legal semi-automatic rifles that had been altered to fire as automatic rifles. We conclude that there is ample evidence to support the categorization of each of the weapons concerned as a firearm within the meaning of the Act.

A more interesting issue here is Shilling's contention that the prosecution should be required to prove that a defendant had specific knowledge of the automatic firing capability of a weapon in a prosecution under the Firearms Act. Shilling correctly contends that the "machine guns" he possessed were originally only semi-automatic rifles, and that they were

converted to automatic firing through trigger manipulation and assembling components by the Government's experts. Shilling contends that because there were no obvious external modifications to these guns, he should be considered to be ignorant of their automatic firing capability unless the Government proves otherwise. He also urges that the Government's assembly of gun components which Shilling had at different locations within his house is an impermissible means of showing that he possessed automatic firearms. As for the contention concerning disassembled guns, we find no merit to Shilling's position. Disassembled guns that were "readily restorable" have been found to come under the Firearms Act by other Circuits. United State v. Lauchli, 371 F.2d 303

(7th Cir. 1966); United States v. Woods, 560 F.2d 660 (5th Cir. 1977); United States v. Smith, 477 F.2d 399 (8th Cir. 1973).

We also reject Shilling's contention that the Government should be required to prove that a defendant knew a particular weapon was automatic. Shilling relies primarily on United States v. Herbert, 698 F.2d 981 (9th Cir. 1983). The Herbert opinion was concerned with weapons that were only internally modified and still appeared to be semi-automatic weapons externally. In such a case, the Ninth Circuit Court of Appeals required the Government to prove that the defendant knew of the automatic nature of the firearm. Even so, the court affirmed the conviction of one of the defendants because of overwhelming

evidence that he knew that the guns were automatic. It reversed the co-defendant's conviction because the only evidence as to him regarded the transportation of the firearms. In this case, there is substantial circumstantial evidence that Shilling knew the weapons were converted. Moreover, we decline to follow the Herbert decision in this Circuit. We find a better rule to be provided by Morgan v. United States, 564 F.2d 803 (8th Cir. 1977), which rejected an appellant's contention that the Government must prove actual knowledge of a weapon's physical properties. In Morgan, the Eighth Circuit Court of Appeals held as follows:

> Sufficient intent is established if the defendant is shown to have possessed an item "which he knew to be a firearm within the general meaning of the term."

564 F.2d at 805. We note that a similar approach was adopted in United States v. Decker, 292 F.2d 89 (6th Cir. 1961), and in United States Gonzalez, 719 F.2d 1516 (11th Cir. 1983).

Related claims by Shilling urge that the evidence was insufficient to support his convictions for possession of a short barrel rifle (Count 5); and .45 calibre machine gun (Count 11) and the sets of parts designed for us in converting a weapon into a machine gun (Counts 14 and 15). These claims generally focus on the component part issue noted above, except for the machine gun in Count 11. Shilling claims the Count 11 machine gun was owned by an associate, Alexander Garrison, who was at Shilling's house on the night of the raid. The Count 11

machine gun was found in Shilling's garage, the same location as Shilling's Uzi rifle. There was substantial circumstantial evidence that Shilling used straw purchasers like Garrison to sign on the purchase forms for guns that Shilling himself obtained. It was within the jury's province to determine whether the Count 11 machine gun belonged to Shilling. We find no reason to disturb the jury's decision cn that point.

(2) Shilling's Claim That a Conflict of Interest With His Original Counsel Denied Him the Effective Assistance of Counsel.

Shilling claims that when Attorney David Nichols testified before the grand jury pertaining to the false tax return charges, Nichols and Shilling's other attorney, Jack Kennett, were placed in

conflict with Shilling's own interests. Shilling claims that the indictment for income tax violations should be dismissed because he did not have conflict-free counsel representing him. He also contends that Nichols revealed confidential communications from Shilling to the grand jury. These issues were raised below, and the trial court found that Nichols had not revealed any confidential communications and that Shilling had not been affected by the alleged conflict.

Nichols' testimony preceded Shilling's Indictment on tax charges. After Shilling's indictment in July 1984, on tax charges, the Government advised Nichols that it would move to disqualify him should he represent Shilling on the tax charges. Shilling than obtained new

counsel for all of his pending charges. The central problem with Shilling's claim of ineffective assistance of counsel is that he makes no showing here that the alleged conflict had an adverse impact on the quality of legal representation given him before the grand jury. For a successful Sixth Amendment claim, Shilling must show such an adverse impact. See, Strickland v. Washington, 466 U.S. 668, 692 (1984); United States v. Morrison, 449 U.S. 361, 365 (1981).

Shilling does not argue that any particular statements made by Nichols were privileged, but rather he claims that there should be a presumption of privileged communication. We reject this claim. Under United States v. Jones, 696 F.2d 1069, 1072 (4th Cir. 1982), Shilling must demonstrate the privilege's

applicability. Moreover, "it is the unquestioned rule that the mere relationship of attorney-client does not warrant a presumption of confidentiality." In Re Grand Jury Proceeding, 727 F.2d 1352, 1356 (4th Cir. 1984). The district court reviewed the transcript of Nichols' testimony and found no privileged communications were revealed. Shilling has given no good reason to reverse that view.

(3) Shilling's Claim That the Warrant that Authorized the Search of His Residence Was an Invalid General Warrant, or Alternatively That the Method of Executing the Warrant Amounted to a General Search.

There is no question that, to be valid, the search warrant obtained for the search of Shilling's residence must

have sufficiently described the items to be seized. This search was the occasion on which the firearms, illegal liquor, records for the tax prosecution, and other items were seized.

We have previously recognized that the specificity required for a warrant varies with circumstances within a "practical margin of flexibility." United States v. Torch, 609 F.2d 1088, 1090 (4th Cir. 1979). Here, the warrant was issued by a Magistrate and contains a two-page list of items for the search. Although the warrant uses generic terms (such a books, records, bank statements, etc.) without detailed descriptions, we consider this to be acceptable, since the Government could hardly have known in detail what precise business records were maintained by the defendant. Likewise,

there is no flaw in the fact that the documents covered by the warrant did not have specific time period attached. The dates of specific documents could not have been known to the Government, and, as for income tax violations, documents from an earlier time may have bearing on the tax violations alleged in a later year. See, United States v. Espinoza, 641 F.2d 153 (4th Cir. 1981).

The most troublesome aspect of Shilling's appeal derives from the execution of the search. The Government itself notes that "the warrant here was perfectly executed except for the seizure of documents." The Government admits that because of the volume of the documents and the desire to keep them intact and prevent loss, IRS agents seized some documents outside the

warrant. In Fact, the IRS agents removed entire file cabinets from the house. IRS Special Agent Higgenbotham testified as follows:

> Well, it wasn't really a search. It wasn't really a search. We reviewed the documents in the file cabinet and realized there were so many documents that we could not go through them. So we decided to keep them in one place, and that is when we decided to take the whole cabinet.

Some courts have found that practical considerations justify the seizure of entire file cabinets. See, United States v. Taumra (sic) 694 F.2d 591 (9th Cir. 1982). Here, it is clear that

substantial practical problems were presented by the task of examining the mass of Shilling's records. While the Government's desire to keep the records intact may have real merit, we cannot easily condone the wholesale removal of filing cabinets and document not covered by the warrant. In expressing our concern over this procedure, we quote from a portion of the Ninth Circuit's decision in Tamura:

> In the comparatively rare instances where documents are so intermingled that they cannot feasibly be sorted on sight, we suggest that the Government and law enforcement officials generally can avoid violating fourth Amendment rights by sealing and holding the documents pending approval by a magistrate of a further search. . . .

694 F.2d at 595-96.

We recognize the questionable

propriety of the IRS agents' seizure of documents not covered by the warrant, as did the court below in its Order denying Shilling's suppression motion. Even so, it must be emphasized that the documents which pertained to the counts on which Shilling pled guilty had been lawfully seized, since they had been described in what we have found to be a valid search warrant. The exclusionary rule does not compel suppression of evidence properly covered by a warrant merely because other material not covered by the warrant was taken during the same search, especially where, as in this case, such other materials were not received into evidence against the defendant. See Tamura, 694 F.2d at 597; United States v. Daniels, 549 F.2d 665, 668 (9th Cir. 1977). Because we conclude that the over-broad

seizure of records here was prompted by legitimate practical concerns, rather than by an intent to engage in a fishing expedition through Shilling's papers, we reject Shilling's claim that the documents seized should be suppressed.

For the reasons noted herein, the judgments of conviction in each of these cases are hereby

AFFIRMED.

21 United States Code, Sec. 881 provides, in pertinent part, as follows:

Forfeitures

Subject Property

(a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:

(1) All controlled substances which have been manufactured, distributed, dispenses, or acquired in violation of this subchapter.

(2) All raw materials, products, and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance in violation of this subchapter.

(3) All property which is used, or intended for use, as a container for property described in paragraph (1) or (2).

(4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1) or (2), except that -

(A) no conveyance used by any person as a common carrier in the transaction of business as a common carrier shall be forfeited under the provisions of this section unless it shall appear that the owner or other

APPENDIX B

person in charge of such conveyance was a consenting party or privy to a violation of this subchapter or subchapter II of this chapter; and

(B) no conveyance shall be forfeited under the provisions of this section by reason of any act or omission established by the owner thereof to have been committed or omitted by any person other than such owner while such conveyance was unlawfully in the possession of a person other than the owner in violation of the criminal laws of the United States, or of any State.

(5) All books, records, and research, including formulas, microfilm, tapes, and data which are used, or intended for use, in violation of this subchapter.

(6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the

knowledge or consent of that owner.

(7) All real property, including any right, title, and interest in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this title punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

(8) All controlled substances which have been possessed in violation of this subchapter.

TITLE 21, U.S.C. SECTION 881

Forfeitures

Vesting Title in United States

(h) All right, title, and interest in property described in subsection (a) of this section shall vest in the United States upon commission of the act giving rise to forfeiture under this section.